

SCHWARTZER & MCPHERSON LAW FIRM
 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
 Tel: (702) 228-7590 · Fax: (702) 892-0122

Annette W. Jarvis, Utah Bar No. 1649
 RAY QUINNEY & NEBEKER P.C.
 36 South State Street, Suite 1400
 P.O. Box 45385
 Salt Lake City, Utah 84145-0385
 Telephone: (801) 532-1500
 Facsimile: (801) 532-7543
 Email: ajarvis@rqn.com

and

Lenard E. Schwartzer, Nevada Bar No. 0399
 Jeanette E. McPherson, Nevada Bar No. 5423
 Schwartzer & McPherson Law Firm
 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
 Telephone: (702) 228-7590
 Facsimile: (702) 892-0122
 E-Mail: bkfilings@s-mlaw.com
 Attorneys for Debtors

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☒ USA Capital Diversified Trust Deed Fund, LLC
☐ USA First Trust Deed Fund, LLC

Case Nos. BK-S-06-10725 LBR
 Case Nos. BK-S-06-10726 LBR
 Case Nos. BK-S-06-10727 LBR
 Case Nos. BK-S-06-10728 LBR
 Case Nos. BK-S-06-10729 LBR

Chapter 11

Jointly Administered Under
 Case No. BK-S-06-10725 LBR

**MOTION TO AUTHORIZE DEBTOR
 USA COMMERCIAL MORTGAGE
 COMPANY AS LOAN SERVICER TO
 ACCEPT PAYMENTS AND PROVIDE
 RECONVEYANCES FOR TWO COLT
 GATEWAY LOANS [AFFECTS
 DEBTORS USA COMMERCIAL
 MORTGAGE COMPANY AND USA
 CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC]**

Date of Hearing: March __, 2007
 Time of Hearing: 9:30 a.m.

Debtor in Possession USA COMMERCIAL MORTGAGE COMPANY ("USACM"), by and through its counsel Lenard E. Schwartzer, Esq. of the Schwartzer & McPherson Law Firm, hereby files its "Motion To Authorize Debtor USA Commercial Mortgage Company as Loan Servicer to Accept Payments and Provide Reconveyances for Two Colt Gateway Loans" (the "Motion"), requesting that the Court authorize USACM to do the following:

A. Authorize USACM to accept payments of two loans (the "Colt Gateway Loans") that are owed by Borrower Colt Gateway LLC ("Colt Gateway"). One of the Colt Gateway Loans is being serviced by USACM for three Direct Lenders, one of which is Debtor USA Capital Diversified Trust Deed Fund, LLC ("Diversified"). The second Colt Gateway Loan is owed to USACM as the sole Direct Lender under such loan.

B. Authorize USACM to provide and authorize reconveyances for the Colt Gateway Loans that are being paid.

This Motion is made and based upon 11 U.S.C. §§ 105 and 363(b)(1), the Points and Authorities set forth herein, the Declarations of Thomas J. Allison on file with this Court, and any arguments presented at the hearing on this Motion. Granting this Motion will benefit not only USACM's bankruptcy estate, but also benefit the Direct Lenders for the Colt Gateway Loans, which include Diversified and USACM.

POINTS AND AUTHORITIES

General Factual Background

1. All five Debtors in the caption above (the "Debtors") filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code on April 13, 2006 (the "Petition Date"). The Debtors continue to operate their businesses and possess their property as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

2. The statutory predicates for the relief requested herein are 11 U.S.C. § 105 and 11 U.S.C. § 363(b)(1).

3. Colt Gateway has an outstanding loan obligation currently being serviced by USACM (the "Colt Gateway #1 Loan") that is evidenced by that certain Note dated December 22, 2002, as modified in July 2003, for an original principal loan amount of Eight Million Seven

SCHWARTZER & MCPHERSON LAW FIRM
 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
 Tel: (702) 228-7590 · Fax: (702) 892-0122

Hundred Thousand Dollars (\$8,700,000) (“Note 1”).¹ Note 1 is secured by a lien established against real property of Colt Gateway in the City of Hartford, Hartford County, Connecticut, by that certain Mortgage Deed and Security Agreement dated as of December 22, 2002, recorded on January 24, 2003, and modified on July 9, 2003, recorded on August 1, 2003, all in the Hartford Land Records of Hartford County, Connecticut (“Mortgage 1”). The Colt Gateway #1 Loan was not included in Schedule 1 or Schedule 2 of the Asset Purchase Agreement dated December 8, 2006 (the “Compass APA”), between Debtors and Compass Partners, LLC (“Compass”) (see Bankruptcy Case Docket No. 2164), and therefore was not included in the sale of certain assets of USACM to Compass. Diversified did not sell any of its assets to Compass pursuant to the Compass APA. See, Declaration of Thomas J. Allison in Support of Motion To Authorize Debtor USA Commercial Mortgage Company as Loan Servicer to Accept Payments and Provide Reconveyances for Two Colt Gateway Loans being filed contemporaneously herewith (“Allison Declaration”) at ¶ 5.

4. The current principal balance of the Colt Gateway #1 Loan is \$5,905,051.40. The additional amounts that were owed on the Colt Gateway #1 Loan as of February 28, 2007, along with the per diem for the interest accrual, are as follows: Non-Default Interest: \$1,787,468.38 (per diem of \$3,205.22); Default Interest: \$50,000.00; Late Fees: \$89,937.41; Origination Fee: \$1,700,000.00. See, Allison Declaration at ¶ 6.

5. The Direct Lenders for the Colt Gateway #1 Loan are the Estate of Daniel Tabas (“Tabas”), Fertitta Enterprises, Inc. (“Fertitta”), and Diversified. Their respective undivided interests in the Colt Gateway #1 Loan are approximately as follows: Fertitta – 46.0%; Tabas – 11.5%; Diversified – 42.5%. See, Allison Declaration at ¶ 7.

6. Colt Gateway also has an outstanding loan obligation owed solely to USACM as the sole Direct Lender (the “Colt Gateway #2 Loan”). The Colt Gateway #2 Loan is evidenced by that certain Note dated August 18, 2003, as modified on January 17, 2004, for an original principal

¹ As set forth more fully in paragraph 10 below, Diversified maintains that certain advances to Colt Gateway were made as additional advances on Note 1, and nothing contained in this Motion shall be construed to in any way impact or affect Diversified’s rights in connection with such contentions; nor shall anything herein be deemed an admission against Diversified.

1 loan amount of One Million Dollars (\$ 1,000,000) ("Note 2"). Note 2 is secured by a lien
 2 established against real property of Colt Gateway in the City of Hartford, Hartford County,
 3 Connecticut, by that certain Mortgage Deed and Security Agreement dated as of August 19, 2003,
 4 recorded on September 8, 2003, in the Hartford Land Records of Hartford County, Connecticut
 5 ("Mortgage 2" and together with Mortgage 1, the "Mortgages"). The Colt Gateway #2 Loan was
 6 not included in Schedule 1 or Schedule 2 of the Compass APA, and therefore was not included in
 7 the sale of certain assets of USACM to Compass. See, Allison Declaration at ¶ 8.

8 7. The current principal balance of the Colt Gateway #2 Loan is \$1,000,000.00. The
 9 additional amounts that were owed on the Colt Gateway #2 Loan as of February 28, 2007, along
 10 with the per diem for the interest accrual, are as follows: Non-Default Interest: \$704,567.54 (per
 11 diem of \$710.24); Late Fees: \$8,950.64; Extension Fee: \$40,000.00. See, Allison Declaration at
 12 ¶ 9.

13 8. Colt Gateway has agreed to pay both of the Colt Gateway Loans, and has requested
 14 payoff letters from USACM. As part of the payoff discussions, USACM has agreed that default
 15 interest of \$50,000.00 will be charged on the Colt Gateway Loans in connection with the payoffs
 16 of the Colt Gateway Loans. See, Allison Declaration at ¶ 10.

17 9. Diversified made additional advances to Colt Gateway. On July 10, 2003,
 18 Diversified provided Colt Gateway with an additional \$1,500,000 advance (the "Div 1 Advance").
 19 On September 26, 2003, Diversified provided Colt Gateway with an additional \$3,718,777
 20 advance (the "CREC Advance"). On April 1, 14 and 23, 2004, Diversified provided Colt Gateway
 21 with additional advances in the aggregate amount of \$3,100,000 (the "Div 2 Advance").

22 10. The Official Committee of Equity Security Holders of USA Capital Diversified
 23 Trust Deed Fund, LLC (the "DTDF Committee"), on behalf of Diversified, contends the Div 1
 24 Advance, Div 2 Advance and the CREC Advance (collectively the "Subsequent Diversified
 25 Advances") also are secured by the Note 1 and Mortgage 1. Nevertheless, upon completion of the
 26 transaction outlined in this Motion, the DTDF Committee on behalf of Diversified has agreed that
 27 Mortgage 1 may be fully reconveyed, notwithstanding the contentions of the DTDF Committee
 28 with respect to the Subsequent Diversified Advances. The DTDF Committee on behalf of

Diversified is willing to enter into an agreement with Colt Gateway and Homes for America Holdings defining its reservation of rights.

11. The DTDF Committee has requested that USACM allocate to Diversified a portion of the \$1,700,000 origination fee that is to be collected on the Colt Gateway #1 Loan (the “Origination Fee”) on the basis that the Origination Fee should be attributable in part to the Subsequent Diversified Advances. The Unsecured Creditors Committee, on behalf of USACM, has agreed that the \$1,700,000 Origination Fee (after it has been paid as part of the payoff of the Colt Gateway #1 Loan) should be allocated \$1,300,000 to Diversified, and \$400,000 to USACM. See, Allison Declaration at ¶ 11.

12. Among other powers, USACM as Servicer has generally been authorized by the Court to exercise in the ordinary course of business all of the powers that a loan servicer customarily exercises for a serviced loan that is being paid in full and with respect to the related real or personal property securing such loan. These powers include executing and delivering the following documents: demands for payoff, final payoff statements, instruments of satisfaction or cancellation, and instruments of or authorizations for full release, discharge, or reconveyance (the “Loan Servicer Powers”). See, Allison Declaration at ¶ 12.

13. USACM asserts that exercising its Loan Servicer Powers is an ordinary course of business transaction that does not require Court approval under 11 U.S.C. § 363(c)(1). Nevertheless, in an abundance of caution, USACM is filing this Motion to request a Court order specifically authorizing USACM to exercise its Loan Servicer Powers with respect to the anticipated payment in full of the Colt Gateway Loans. See, Allison Declaration at ¶ 13.

Statement of the Law

14. USACM is engaged in the business of servicing fractional interests in various commercial loans. As part of that business, USACM customarily receives requests for payoff statements for the loans that it is servicing or for loans in its own loan portfolio as well as requests that USACM exercise its Loan Servicer Powers in connection with the payoffs of such loans. See, Allison Declaration at ¶ 14.

15. USACM has reviewed the requested loan payoffs for the Colt Gateway Loans. It is

USACM's business judgment that it would be beneficial to the Direct Lenders of the Colt Gateway Loans (including the bankruptcy estates of USACM and Diversified) if USACM accepted the payoffs of the Colt Gateway Loans and exercised its Loan Servicer Powers in connection with the payoffs of the Colt Gateway Loans. See, Allison Declaration at ¶ 15.

16. Although USACM's acceptance of the payoffs of the Colt Gateway Loans and exercise of its Loan Servicer Powers arguably is in the ordinary course of USACM's business that would require no Court approval, with the oversight being requested by the Four Official Committees and the United States Trustee, USACM has brought this Motion for Court approval. See, Allison Declaration at ¶ 16.

17. Colt Gateway has agreed that the payoffs of the Colt Gateway Loans and the reconveyances of the Mortgages do not and will not in any way affect the rights of Diversified and the DTDF Committee with respect to the transactions concerning the Div 1 Advance, Div 2 Advance and the CREC Advance.

18. Section 105(a) of the Bankruptcy Code allows this Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). Under Section 105(a) of the Bankruptcy Code, the Court has expansive equitable powers to fashion any order or decree that is the interest of preserving or protecting the value of the debtor's assets. *See, Chinician v. Campolongo (In re Chinichian)*, 784 F.2d 1440, 1443 (9th Cir. 1986) ("Section 105 sets out the power of the bankruptcy court to fashion orders as necessary pursuant to the purposes of the Bankruptcy Code.")

19. If USACM's use of its Loan Servicer Powers in connection with the payoffs of the Colt Gateway Loans these transactions was viewed as an extraordinary transaction, such that the "ordinary course of business" authorization of Section 363(c)(1) of the Bankruptcy Code does not apply, Section 363(b)(1) of the Bankruptcy Code provides the necessary authority for the Court to authorize USACM to exercise its Loan Servicer Powers. Section 363(b)(1) provides that a debtor in possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." "Section 363 of the [Bankruptcy] Code seems on its face to confer upon the bankruptcy judge virtually unfettered discretion to authorize the use, sale or lease,

1 other than in the ordinary course of business, of property of the estate.” *Committee of Equity Sec.*
 2 *Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1069 (2nd Cir. 1983).

3 20. To approve the use, sale or lease of property other than in the ordinary course of
 4 business, there must be “a sound business purpose [that] justifies such actions.” *In re Montgomery*
 5 *Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999). Under the circumstances outlined above,
 6 USACM’s business judgment that USACM should be authorized to accept the payoffs of the Colt
 7 Gateway Loans and exercise its Loan Servicer Powers in connection with the payoffs of the Colt
 8 Gateway Loans is fully supported by the “business judgment test” which is the standard for
 9 approval of transactions under Section 363(b)(1). *Id.*

10 CONCLUSION

11 The Debtor requests that the Motion be granted, and that the Court: (a) authorize USACM
 12 to accept the payments of the two Colt Gateway Loans, consistent with the terms outlined above in
 13 this Motion, (b) authorize USACM to exercise its Loan Servicer Powers in connection with the
 14 repayments of the two Colt Gateway Loans, including providing and authorizing reconveyances
 15 for the collateral securing the Colt Gateway Loans (including without limitation releasing the
 16 Mortgages), and (c) authorize USACM to execute all documents and take all other necessary steps
 17 required to implement any of the foregoing actions.

18 DATED: February 27, 2007.

19 Annette W. Jarvis, Utah Bar No. 1649
 20 RAY QUINNEY & NEBEKER P.C.
 21 36 South State Street, Suite 1400
 22 P.O. Box 45385
 23 Salt Lake City, Utah 84145-0385

24 and

25 /s/ Jeanette E. McPherson
 26 Lenard E. Schwartz, Nevada Bar No. 0399
 27 Jeanette E. McPherson, Esq., Nevada Bar No. 5423
 28 SCHWARTZER & MCPHERSON LAW FIRM
 2850 South Jones Boulevard, Suite 1
 Las Vegas NV 89146
 Attorneys for Debtors